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Constitutional Law - Police Power - Equal Protection - Voluntary Deviate Sexual Intercourse Statute

Louis Bader

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CONSTITUTIONAL LAW—POLICE POWER—EQUAL PROTECTION—VOLUNTARY DEVIATE SEXUAL INTERCOURSE STATUTE—The Pennsylvania Supreme Court has held that the Pennsylvania voluntary deviate sexual intercourse statute is beyond the valid exercise of the state's police power and is violative of the equal protection clauses of the Constitution of the United States and the Constitution of the Commonwealth of Pennsylvania.

Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980).

In March, 1979, two "exotic" dancers, employed by an adult theater featuring pornography, were arrested in Pittsburgh, Pennsylvania, and charged by information with voluntary deviate sexual intercourse, a misdemeanor of the second degree.[1] The defendants appeared before the Common Pleas Court of Allegheny County, Criminal Division, and filed a pre-trial motion to quash an information, which was granted.[2] The common pleas court held that the Pennsylvania voluntary deviate sexual intercourse statute is unconstitutional on its face because it constitutes an impermissible invasion of privacy.[3] According to the court, the statute violates the defendant's fundamental right of privacy because there is no compelling state interest justifying interference with an individual's sexual behavior as long as the behavior does not involve unwilling participants.[4] In addition, the court held that the statute violates the equal protection clause of the United States Constitution because the criminality of the conduct depends upon the actors' unmarried status.[5] The court found no rational basis for such a distinction and held that the marital status of voluntarily participating

1. Commonwealth v. Bonadio, 490 Pa. at 91, 94, 415 A.2d 47, 49 (1980). 18 PA. CONS. STAT. ANN. § 3124 (Purdon 1973) provides: "A person who engages in deviate sexual intercourse under circumstances not covered by section 3123 of this title (related to involuntary deviate sexual intercourse) is guilty of a misdemeanor of the second degree." 18 PA. CONS. STAT. ANN. § 3101 (Purdon 1973) provides in relevant part: "'Deviate sexual intercourse.' Sexual intercourse per os or per anus between human beings who are not husband and wife."

The theater's cashier (Bonadio) and manager were also arrested and charged with criminal conspiracy. 490 Pa. at 101, 415 A.2d at 52 (Nix, J., dissenting). *See* 18 PA. CONS. STAT. ANN. § 903 (Purdon 1973).

2. Commonwealth v. Bonadio, No. CC7901507A (C.P. Allegh. County July 6, 1979), *aff'd*, 490 Pa. 91, 415 A.2d 47 (1980).

3. *Id.* at 5-6.

4. *Id.*

5. *Id.* at 2-3. *See* Reed v. Reed, 404 U.S. 71 (1971). In *Reed* the Supreme Court stated that under the equal protection clause a classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Id.* at 75-76.

adults bears no logical relationship to the criminality of sexual conduct.[6] The lower court concluded that if voluntary deviate sexual intercourse constitutes a threat to the public interest and is abhorrent to most people, it should be proscribed for all citizens, not for only unmarried citizens.[7]

The Commonwealth appealed[8] to the Supreme Court of Pennsylvania and allocatur was granted.[9] The Pennsylvania Supreme Court affirmed the decision of the court of common pleas on the grounds that the voluntary deviate sexual intercourse statute exceeds the valid bounds of the state's police power and violates the equal protection clauses of the United States and Pennsylvania constitutions.[10]

Writing for the majority,[11] Justice Flaherty first noted that because enforcement of the statute had been undertaken against them, the appellees had standing to assert that the statute impermissibly discriminated against unmarried persons, of which class the appellees were members.[12] The court stated that it did not need to determine whether the appellees had standing to raise the right of privacy because it based its decision solely on equal protection grounds.[13]

The court next addressed the Commonwealth's contention that the statute was a valid exercise of the state's police power to regulate health, safety, welfare, and morals.[14] The court noted that state police power is not unlimited. To justify an exercise of state authority, the state must show that the general public interest requires state interference and that the means are reasonably necessary to accomplish the purpose, and are not unduly oppressive.[15]

The majority declared that the state has a valid interest in protecting the public from inadvertent exposure to offensive displays of sexual

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6. Commonwealth v. Bonadio, No. CC7901507A, slip op. at 3 (C.P. Allegh. County July 6, 1979).

7. *Id.*

8. *See* Commonwealth v. Blevins, 453 Pa. 481, 309 A.2d 421 (1973) (state may appeal from an adverse ruling in a criminal case where the question involved is purely one of law).

9. Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980).

10. *Id.* at 98, 415 A.2d at 51.

11. The court was divided 4-3. Chief Justice Eagen and Justices Larsen and Kauffman joined in the majority opinion. Justices Roberts, O'Brien, and Nix dissented.

12. 490 Pa. at 94 n.2, 415 A.2d at 49 n.2. The Commonwealth argued that because the lower court made no decision as to whether the statute as applied to the appellees was constitutional, the case should be remanded for development of a full record of the factual setting. The court, however, believed that the factual setting was set forth clearly enough in the complaints and informations. *Id.*

13. *Id.*

14. *Id.* at 95, 415 A.2d at 49.

15. *Id. See* Lawton v. Steele, 152 U.S. 133, 137 (1894).

behavior, in protecting people from involuntary submission to sexual contact, and in protecting minors from sexual abuse.[16] The court determined, however, that the challenged statute serves none of these purposes, nor does it promote a state interest in the institution of marriage.[17] The majority concluded that the only possible purpose of the statute is regulation of the private conduct of consenting adults.[18] The court pointed out that, according to the drafters of the Model Penal Code, atypical sexual practices in private between consenting adults do not harm the secular interests of the community.[19]

The majority next discussed the statute's violation of the equal protection clause.[20] The court stated that a classification which makes acts criminal only when performed by unmarried persons is violative of the equal protection clause where the differential treatment is not supported by a sufficient state interest.[21] The court declared that to treat similarly situated persons differently, the classification must be reasonable and have a fair and substantial relation to the object of the legislation.[22] The court pointed out that requiring a lower standard of moral behavior for married persons than for unmarried persons is without basis in logic.[23]

Convinced that the statute violated the constitutional right of equal protection, Chief Justice Eagen, joined by Justices Larsen and Kauffman, concurred in the result.[24] Justice Larsen wrote separately to point out that *all* public sexual intercourse should be illegal, not only that involving unmarried persons.[25]

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16. 490 Pa. at 95, 415 A.2d at 49.

17. *Id.* at 95, 415 A.2d at 49-50.

18. *Id.* at 96, 415 A.2d at 50. Relying on the philosophy of John Stuart Mill, the court stated that the police power should protect the individual's right to be free from interference in defining and pursuing his own morality, it should not enforce a majority morality on persons whose conduct does not harm others. *Id.* (quoting J. MILL, ON LIBERTY (1859)).

19. *Id.* (quoting MODEL PENAL CODE § 207.5 (Tent. Draft No. 4, 1955)).

20. 490 Pa. at 98, 415 A.2d at 50-51.

21. *Id.* Assuming, but not deciding, that no fundamental right was involved, *see* note 49 *infra*, the court did not apply the strict scrutiny test to the classification. *Id. See* Dunn v. Blumstein, 405 U.S. 330 (1972) (fundamental right requires strict scrutiny).

22. 490 Pa. at 98, 415 A.2d at 50-51 (quoting Moyer v. Phillips, 462 Pa. 395, 400-01, 314 A.2d 441, 443 (1975)).

23. 490 Pa. at 99, 415 A.2d at 51. The court rejected the Commonwealth's argument that by excluding married persons' conduct from coverage, the statute furthered the state interest in promoting the privacy inherent in the marital relationship. According to the court, the marital status of voluntarily participating adults bears no rational relationship to the criminality of a sexual act. *Id. See* Eisenstadt v. Baird, 405 U.S. 438 (1972) (because the "evil" in outlawing distribution of contraceptives is identical regardless of the marital status of the parties, the marital classification was "invidious").

24. 490 Pa. at 100, 415 A.2d at 52. (Eagen, C.J., concurring).

25. *Id.* (Larsen, J., concurring).

Justice Roberts, joined by Justice O'Brien, dissented. Because the appellee's conduct had taken place before a public audience, he found no basis upon which to invalidate the statute.[26]

Justice Nix dissented on the ground that the facts did not involve private, intimate conduct between consenting adults.[27] He found it incredible that the majority could hold that the public display of "the most depraved type of sexual behavior for pay" is beyond the state's power to regulate public health, safety, welfare, and morals.[28] Justice Nix concluded that the majority's concern with the statute's marital exception is misplaced because the exception relates to the intimacy of a *private* marital sexual relationship. Here, the sexual acts were performed in public and for pay. Thus, according to Justice Nix, the marital status of the participants would not have affected their culpability.[29]

A majority of states retain statutes proscribing private sodomous acts between consenting adults.[30] Recently, however, a growing number of jurisdictions have legislated to exclude these acts from the purview of their criminal law.[31] Additionally, the highest courts of some states have held consensual sodomy statutes to be an unconstitutional violation of the right of privacy,[32] a denial of equal protection,[33] or to be void for vagueness.[34]

The court in *Bonadio* stated that it based its decision solely on equal protection grounds.[35] The court was constrained to so limit its rationale because the challenged conduct was public, not private.[36] If the majority had based its decision on a right of privacy, it would have been ex-

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26. *Id.* (Roberts, J., dissenting).

27. *Id.* (Nix, J., dissenting). Justice Nix declared that the majority's analysis of the statute as unconstitutional on its face has been judicially sanctioned only in relation to first amendment claims. *Id.* at 100 n.1, 415 A.2d at 52 n.1 (Nix, J., dissenting).

28. *Id.* at 100, 415 A.2d at 52-53 (Nix, J., dissenting). Justice Nix assumed that the majority's ruling would also put the regulation of prostitution and hard core pornography beyond the state's control. *Id.* at 101, 415 A.2d at 53.

29. *Id.* at 102, 415 A.2d at 53.

30. *See, e.g.*, ALA. CODE tit. 13, § 13-1-110 (1977); ARIZ. REV. STAT. ANN. §§ 13-1411, -1412 (1978); FLA. STAT. ANN. § 800.02 (West 1976); GA. CODE ANN. § 26-2002 (1972); IDAHO CODE § 18-6605 (Supp. 1975); KAN. STAT. § 21-3505 (1974); LA. REV. STAT. ANN. § 14.89 (West Supp. 1976); UTAH CODE ANN. § 76-5-403 (Spec. Supp. 1975).

31. *See, e.g.*, CAL. PENAL CODE §§ 286, 288(a) (West Supp. 1976); COLO. REV. STAT. ANN. §§ 18-3-403 to 405 (1973); CONN. GEN. STAT. § 53-214 (Supp. 1976); ILL. ANN. STAT. ch. 38, § 11-3 (Smith-Hurd 1967); VT. STAT. ANN. tit. 13, § 2603 (1977).

32. *See* People v. Onofre, 51 N.Y.2d 476, 485, 415 N.E.2d 936, 939, 434 N.Y.S.2d 947, 949 (1980); State v. Pilcher, 242 N.W.2d 348, 359 (Iowa 1976).

33. *See* People v. Onofre, 51 N.Y.2d at 491, 415 N.E.2d at 942, 434 N.Y.S.2d at 953.

34. *See* Commonwealth v. Balthazar, 366 Mass. 298, 302, 318 N.E.2d 478, 481 (1974).

35. 490 Pa. at 94 n.2, 415 A.2d at 49 n.2.

36. *Id.* at 101, 415 A.2d at 52.

amining the statute "on its face,"[37] and such an examination is sanctioned only where first amendment rights are involved.[38]

However, in holding that the statute is an invalid exercise of the state's police power,[39] the majority goes beyond the facts of the case. In order for the state to validly exercise its police power, the general public must benefit from such state interference, and the means may not unduly oppress the individual.[40] Justice Flaherty characterized the sole purpose of the challenged statute as being the regulation of *private* consensual conduct, a purpose which exceeded the state's police power.[41] But *Bonadio* involved public, not private conduct.[42] Therefore, although the majority declared that they would examine the statute only as it applied to the appellees, they based their decision, in part, on a finding that the statute is an invalid regulation of private conduct.

The majority could have examined the constitutionality of the statute on its face if they had relaxed standing. The United States Supreme Court has indicated that the rule requiring standing to attack a statute's constitutionality is subject to exceptions.[43] One such exception is where the litigation would impair the constitutional rights of one not a party to the action and such party has no effective way to preserve those rights.[44] *Bonadio* is such a situation because unmarried, consenting adults who participate in private acts of sodomy are not, as a practical matter, subject to prosecution. Therefore, these individuals are denied a forum in which to assert their own rights.

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37. *See* Younger v. Harris, 401 U.S. 37 (1971). In *Younger* the United States Supreme Court defined a statute "unconstitutional on its face" as "flagrantly and patently violative of express constitutional prohibitions in every clause. . .and in whatever manner and against whomever an effort might be made to apply it." *Id.* at 53-54 (quoting Watson v. Buck, 313 U.S. 387, 402 (1941)).

38. *See* Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971); Dandridge v. Williams, 397 U.S. 471, 484 (1970); Baggett v. Bullitt, 377 U.S. 360, 372 (1964).

39. 490 Pa. at 94 n.2, 415 A.2d at 49 n.2.

40. *Id.* at 95, 415 A.2d at 49. *See* Goldblatt v. Hempstead, 369 U.S. 590, 595 (1962). *See also* Liggett Co. v. Baldridge, 278 U.S. 105, 111-12 (1928) (the exercise of the police power is valid only when the legislation bears a real and substantial relation to the public health, safety, welfare, and morals, or some other aspect of the general welfare).

41. 490 Pa. at 95, 415 A.2d at 50.

42. *Id.* at 101, 415 A.2d at 52.

43. United States v. Raines, 362 U.S. 17 (1960). In *Raines* the Supreme Court stated that standing is a rule of practice and as such is not inviolable. Weighty counterveiling policies give rise to exceptions to such rules of practice. *Id.* at 22.

44. *Id. See also* Eisenstadt v. Baird, 405 U.S. 438 (1972); Barrows v. Jackson, 346 U.S. 249 (1953). In both *Eisenstadt* and *Barrows* the Supreme Court relaxed standing and allowed the litigant to raise the constitutional rights of a third party because of the impact of the litigation on third party interests. 405 U.S. at 442; 346 U.S. at 259.

Because the court in *Bonadio* did not relax standing, it did not find a right of privacy, and therefore it applied the rational relation test to the statute's marital classification.[45] When a statute regulates only certain classes of individuals without a reasonable basis for distinguishing the classes and without evidencing a rational relationship to the fulfillment of a legitimate state purpose, equal protection is offended.[46] In *Bonadio* the Pennsylvania Supreme Court found that the public did not benefit from the prohibition of consensual sodomy for unmarried adults, and that a distinction based on marital status did not bear a rational relationship to the fulfillment of a legitimate state purpose.[47] The Pennsylvania Supreme Court's analysis is consistent with that employed by the United States Supreme Court in cases which involve equal protection challenges to regulations which affect personal liberties.[48]

The United States Supreme Court has indicated that the extent of the examination of a statute challenged on equal protection grounds depends upon the nature and importance of the interest at stake.[49] For instance, when a statute concerning economic or social welfare, zoning,

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45. 490 Pa. at 98, 415 A.2d at 51.

46. *See* Reed v. Reed, 404 U.S. 71, 75-76 (1971). In *Reed* the Supreme Court stated:

> The Equal Protection Clause does. . .deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Id. (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). *See also* McLaughlin v. Flordia, 379 U.S. 184, 190 (1964) (a classification must rest upon a difference which bears a reasonable and just relation to the state's purpose, and the classification cannot be made arbitrarily).

47. 490 Pa. at 99, 415 A.2d at 51-52. Justice Flaherty pointed out that if the state were seeking to prevent an evil, it should proscribe the conduct for married persons as well. *Id. See* text accompanying notes 20-23 *supra.*

48. The United States Supreme Court has never directly decided to what extent the Constitution prohibits state regulation of private consensual sexual behavior among adults. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 688 n.5 (1977). The Supreme Court in Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), affirmed without opinion a district court's decision that a criminal sodomy statute was not unconstitutional as applied to adult males engaged in private and consensual activity. *See* Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

49. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 (1938) (statutory scheme which impinges on individual interests and liberties is subject to a stricter standard of review than the rational basis test traditionally applied to economic legislation); Hollenbaugh v. Carnegie Free Library, 439 U.S. 1052 (1978) (Marshall, J., dissenting from denial of certiorari) (the substantiality of the interest which a state is required to demonstrate in support of a challenged classification varies with the character of the classification and the importance of the individual interests at stake). *See generally* 45 FORD. L. REV. 553, 584 (1976).

or local taxation is challenged on equal protection grounds, the Court applies only a minimal rationality test to determine whether the statute bears a rational relationship to the stated purpose.[50] If *any* state of facts reasonably can be perceived to justify discrimination in the economic area, the statute will withstand an equal protection challenge.[51] However, when confronted with a statute that infringes upon a significant *personal* liberty, the Court has shown a greater proclivity to strike the classification on equal protection grounds. When personal and not economic rights are involved, the Court applies a heightened rational relationship analysis.[52] Such an analysis was employed by the Court in the seminal case of *Eisenstadt v. Baird*.[53] There, a Massachusetts statute proscribed the distribution of contraceptives to married persons.[54] The Court did not find that a fun-

50. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). In *Boraas* the Court upheld a New York zoning ordinance against an equal protection challenge. The Court, quoting Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926), declared: "'If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.'" 416 U.S. at 4. The Court also stated: "We deal [here] with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the equal protection clause if the law be 'reasonable, not arbitrary' . . . and bears 'a rational relationship to a permissible state objective.'" *Id.* at 8 (quoting Reed v. Reed, 404 U.S. 71, 76 (1971). *See* San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 44-53 (1973) (a more restrained form of review than strict scrutiny is appropriate when the "delicate and difficult questions" of local taxation, fiscal planning, and educational policy are involved); McGowan v. Maryland, 366 U.S. 420 (1961) (declining to characterize Maryland's Sunday Closing Laws as being encompassed within the first amendment, the Court stated that under the rational basis test, equal protection is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective); Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (upholding a Kansas statute dealing with the regulation of visual care on the ground that the fourteenth amendment will not be used to strike down arguably unwise state laws which regulate business and industry conditions); Nebbia v. New York, 291 U.S. 502 (1934) (upholding a New York statute providing for minimum prices for milk on the ground that the courts are incompetent and unauthorized to consider the wisdom or practicality of the statute; a statute will not be invalidated unless it is "palpably in excess of legislative power"). *See generally* 45 FORD. L. REV. 553, 584 (1976).

51. *See* McGowan v. Maryland, 366 U.S. 420 (1961).

52. *See, e.g.*, Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172 (1972) (broad latitude is given state economic and social regulation, but the Court exercises a stricter scrutiny when statutory classifications approach sensitive and fundamental personal rights); Eisenstadt v. Baird, 405 U.S. 438 (1972) (Massachusetts statute allowing the distribution of contraceptives to married persons but not to unmarried persons violated the equal protection rights of the unmarried); Poe v. Ullman, 367 U.S. 497, 519 (1961) (Douglas, J., dissenting) (regulation of the use of contraceptives touches upon a significant personal liberty necessitating a more searching judicial inquiry). *See generally* 45 FORD. L. REV. 553, 584 (1976).

53. 405 U.S. 438 (1972).

54. *Id.* at 440-41.

damental interest was at stake nor did it find that unmarried persons constitute a suspect class.[55] However, because the challenged statute touched upon a liberty which is personal in nature, the Court employed a more stringent rational relationship analysis to determine if the law comported with the mandates of the equal protection clause.[56] Ultimately, the Court determined that the classification did not bear a rational relationship to any claimed state objective, hence, it was declared violative of the equal protection clause.[57]

The Pennsylvania Supreme Court in *Bonadio* employed a similar objective-by-objective analysis of the challenged statute. The *Bonadio* court examined each of the state's claimed objectives of protecting the public from indecent exposure, open lewdness, corruption of minors, and of promoting the institution of marriage.[58] The court concluded that the marital status of voluntarily participating adults bore no rational relationship to the fulfillment of these objectives.[59] Although the court did not enunciate the test that it was applying, it correctly applied the heightened rational relationship analysis to the voluntary deviate sexual intercourse statute because the statute infringed upon the individuals' choice of sexual conduct, which entails a significant personal liberty.[60]

The *Bonadio* majority reached the correct result, but, its analysis was incomplete. If the majority had relaxed standing, it could have addressed the police power issue cogently, instead of in the oblique manner which, given the public nature of the conduct, the majority was forced to do. Further, the majority never articulated its application of the heightened rational relation test that the United States Supreme Court has applied in similar cases involving personal liberty. Inclusion of these discussions would have resulted in a more authoritative opinion.

Louis Bader

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55. *Id.* Similarly, the *Bonadio* court did not find a fundamental interest at stake nor did the court determine that unmarried persons constitute a suspect class. 490 Pa. at 98, 415 A.2d at 51.

56. 405 U.S. at 448-52.

57. *Id.* at 454-55.

58. 490 Pa. at 99, 415 A.2d at 51.

59. *Id.* at 95, 415 A.2d at 49-50.

60. *Id.* at 95, 415 A.2d at 50. The court also held that marital status bore no relationship to whether a sexual act should be legal or criminal. *Id.* at 99, 415 A.2d at 51.